87-1270

No.

Supreme Court, U.S.
FILED
JAN 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. _____

Naomi Ruth West, et al.,
Petitioners,
v.
United States of America,
Respondent.

Dulcy Steinlauf, et al.,
Petitioners,
v.
United States of America,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Federal Aviation Administration's regulatory functions have absolute immunity from liability under the Federal Tort Claims Act ("FTCA").

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Petitioners, Naomi Ruth West, et al., respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States

Court of Appeals for the Ninth Circuit, entered in the above-entitled proceedings on October 21, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 830 F.2d 1044, and is reprinted in the Appendix hereto, p. 114a infra. The supplemental findings of fact and conclusions of law memorandum decision of the U. S. District Court for the Eastern District of California (Ramirez, D. J.) has not been reported. It is reprinted in the Appendix hereto, p. 91a infra.

The order of the Court of Appeals for the Ninth Circuit remanding the case to the District Court is not reported. It is reprinted in the Appendix hereto, p. 88a infra.

The memoranda decisions of the U. S. District Court for the Eastern District of California (Ramirez, D. J.) on damages and liability have not been reported. They are reprinted in the Appendix hereto, pp. 37a and 1a (respectively) infra.

JURISDICTION

Invoking Federal jurisdiction under 28 U.S.C. §1346(b), et seq., the petitioner brought this suit in the Eastern District of California. On October 29, 1982, the Eastern District of California concluded that petitioners were entitled to judgment as a matter of law and judgment was entered on behalf of petitioners, and each of them, on the issues of damages and liability as specifically set forth therein. See pp. 36a and 73a (respectively) infra.

On respondent's appeal, the Ninth Circuit on July 25, 1984, remanded for new evaluation the Eastern District's judgment and order and directed the Eastern District to evaluate its decision in light of United States v. Varig Airlines, 467 U.S. 797 (1984). See p. 88a infra.

On remand the Eastern District on August 29, 1985, vacated the judgments in favor of petitioners and ordered a judgment in favor of respondent, the United States of America. See p. 112a infra.

On petitioner's appeal, the Ninth Circuit, on October 21, 1987, entered a judgment and opinion affirming the district court's dismissal of petitioner's complaint for lack of subject matter jurisdiction. See p. 91a infra.

The jurisdiction of this court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

28 U.S.C. §2674 provides, in pertinent part:

> The United States shall be liable respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . .

28 U.S.C. §2680 provides, in pertinent part:

> The provisions of this chapter and §1346(b) of this title [conferring jurisdiction on the District Court's] shall not apply to -
>
> (a) any claim . . . based upon the exercise or performance or failure to

exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused.

STATEMENT

On or about 8:30 p.m. on March 13, 1974, Sierra Pacific Airlines charter flight 182, a twin-engine propeller-driven transport, crashed into a foothill of the White Mountains near Bishop, California. All thirty-six occupants were killed, including petitioners' decedants, Harold Robert West and Dulcy Steinlauf.

The airplane had taken off from Bishop Airport in a southeasterly direction less than five minutes before the crash occurred. It was a very dark, clear night with no moonlight and a high broken layer of clouds. Several persons on the ground

heard the aircraft and saw its lights moments before it crashed. They reported that the engines were maintaining a strong, steady and smooth sound and that the aircraft appeared to be in a gradual climb. There was nothing in any of the finds of the accident investigation team that indicated any malfunction, defect or problem that the flight crew might have encountered with the airplane. Neither was there any indication of evasive maneuvers or attempts by the flight crew to escape from impending danger.

Bishop Airport lies in a deep funnel-shaped valley bounded on the west by the Sierra Nevada Mountains and on the east by the White Mountains. The valley to the south of Bishop is about seven miles wide. At Bishop, and to the north, the valley widens to about twelve miles. The terrain to the east of the airport begins

to rise rapidly at about three and a half miles and to the west of the airport about eight miles. The elevation at the Bishop Airport is approximately 4,100 feet m.s.l.

The flight departure procedure for departing Bishop Airport was prepared by the FAA. It was a required flight procedure for Sierra Pacific Airlines.

The FAA departure procedure required that the airplane climb from take off to 8,000 feet within two miles of the airport. This is done by flying a two mile arc circling around the airport while climbing to 8,000 ft. m.s.l. The mountains are so close to Bishop and are so high that to require a pilot to climb to 8,000 feet under instrument conditions would not provide enough margin for safety to meet FAA requirements, so the FAA employee who prepared the departure procedure required pilots to maintain the

required two mile distance visually. The FAA employee knew when he prepared the departure procedure that there was a visual phenomena whereby pilots flying on a very black night with no ambient lighting, no horizon, and no ground lights except at a distant airport or city could be misled into believing they were closer to the airport than they actually were. However, he made no inquiry or investigation of the ground lighting to the east of the Bishop Airport to determine if there was in fact sufficient ground lighting there to prevent this phenomena from occurring on a black night. There was a lack of ground lights to the east of the airport. The FAA did not flight check the departure procedure at night before publishing it.

After the FAA denied their administrative claims, the West family brought suit in the United States District Court for

the Eastern District of California. The case was consolidated for trial with Steinlauf v. United States, Case No. 83-1893 in the District Court.

Following the trial limited to liability issues, the court decided against the United States, entered Findings of Fact and Conclusions of Law on May 7, 1981 and an Interlocutory Judgment on May 12, 1981. See pp. 1a and 36a (respectively) infra. After a three day trial on the damage issue, the court entered Judgment awarding damages against the United States on November 2, 1982 from which the United States appealed. See pp. 37a and 73a (respectively) infra.

By its Order filed July 25, 1984 the United States Court of Appeals for the Ninth Circuit in the first appeal of this matter "remanded to the District Court to permit it to evaluate its decision in

light of the United States v. Varig Airlines, 467 U.S. 797 (June 19, 1984)." See p. 88a infra.

On remand the District Court ordered an evidentiary hearing for August 14, 1985. Following that hearing Judge Ramirez made Supplemental Findings of Act and Conclusions of Law and entered Judgment thereon in favor of the United States on August 30, 1985. See p. 91a infra.

In due course, petitioners took an appeal to the Ninth Circuit. The petitioners invoked the Ninth Circuit's jurisdiction under 28 U.S.C. §1291 to review "final decisions" of district courts.

The Ninth Circuit thereupon addressed the discretionary function of immunity to the FTCA and affirmed the District Court's dismissal for lack of subject matter jurisdiction. See p. 114a infra.

The Ninth Circuit reviewed de novo the determination of whether the discretionary function exception to the FTCA applied. Baker v. United States, 817 F.2d 560, 562 (9th Cir. 1987). The Ninth Circuit also determined that the Supreme Court's decision in Varig compels an analysis of the nature of the conduct in each case to determine if the discretionary function exception is applicable.

While recognizing that the District Court found that the FAA employees, when making these decisions, where authorized only to consider the safety of the procedure and not social, political or economic considerations other than safety, the Ninth Circuit disagreed with this analysis and found that determination of safety requirements involved a balancing of social, political or economic policies. The Ninth Circuit then determined,

without any factual support, that the FAA employees decided that it would not be feasible or necessary to make any more tests on the departure procedure because the cost of doing the type of test the petitioners suggested would greatly outweigh any safety benefits.

The Ninth Circuit accordingly affirmed the District Court's dismissal for lack of subject matter jurisdiction holding that the design of the departure procedure was an exercise of discretion and the exercise of a discretionary function is an exception to the FTCA.

REASONS FOR GRANTING THE WRIT

This case presents an important question of separation of powers. It probes the boundary between that executive branch conduct which may be challenged in the judicial branch and that which may

not. By the time of the first trial of this case, courts appeared to have found workable guidelines for applying the discretionary function immunity of the Federal Tort Claim Act. At that trial the District Judge, following Eastern Airlines v. Union Trust Co., 221 F.2d 62 (D.C. 1955) and its progeny, found that preparation of the departure procedure involved only technical air traffic control discretion and therefore was not immune from judicial scrutiny. Thereafter, this court decided United States v. Varig Airlines, 467 U.S. 797. The Court of Appeal then remanded this case for reconsideration in the light of Varig. After hearing additional evidence and argument on the discretionary function immunity, the District Judge said:

> This issue is the most confusing, most difficult, most frustrating area of the law I've ever had the

> displeasure of being involved in.

In his decision Judge Ramirez said:

> The present decision represents a complete departure from the Court's prior order of May 8, 1981. While convinced that the departure is mandated by the rationale of Varig, the Court is hopeful that the Varig doctrine will be clarified so as to preclude what this court perceives as a grant of absolute immunity to certain FAA activities.

Need for clarification is evidenced by the fact that as of November 1987, when this case was argued to the Court of Appeal, Varig, which had been decided three years previously, had been cited 201 times by lower courts. In the Ninth Circuit alone there were nine opinions discussing post Varig application of the discretionary function immunity. It is

not an exaggeration to say that our jurisprudence is in a shambles in this area and badly in need of clarification.

The FTCA's waiver of sovereign immunity does not apply to any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." Since every volitional act involves some discretion it is apparent that Congress intended only certain kinds of discretion to be immune. This Court has interpreted the grant of immunity to encompass those acts and omissions which are grounded in social, political or economic considerations. Dalehite v. United States, 346 U.S. 15 (1953).

Before the Varig case a generally workable rule had evolved whereby the

focus was on the person whose conduct was claimed to have been negligent. If he was at policy making level, there was immunity but, if at an operational level, there was no immunity.

In Varig an FAA subordinate at the operational level was carrying out a policy of spot checking an aircraft manufacturer for compliance with safety regulations. A violation missed by the subordinate was alleged as the basis of liability on the part of the United States. This Court found immunity because the alleged negligent conduct was in fact that of the policy maker who decided, for economic and staffing reasons, to adopt the policy of spot checking.

The uncertainty which now exists in the lower court is whether the grant of immunity is indeed a blanket immunity of all conduct of FAA subordinates or only

that subordinate conduct which is in fact grounded in social, political or economic considerations.

In this case, the FAA subordinate who prepared the departure procedure, Mr. Paul Cromwell, did not and was not authorized to consider social, political or economic matters. He was to consider only safety. The distinction appears in a discussion between the District Judge and counsel wherein the Judge stated:

> It appears that Mr. Cromwell who was, in fact, from my standpoint, the only FAA employee who participated in the preparation of the departure procedure from Bishop, and Mr. Anderson who flew the so-called flight check, the commissioning flight check for the Bishop VOR, each of them making respective choices or decisions which the FAA left to their professional judgment and discretion. I'll use the term "discretion" in the easiest simplistic terms. And it appears also when these gentlemen made their

> professional judgments or discretionary decisions, they made them somewhat--steal a phrase from Varig--not based on any social, economic or political considerations but exclusively on a consideration of safety. Would you agree with this statement?

Counsel for plaintiffs agreed but counsel for the United States contended that because those subordinates had to make judgments about the users of aircraft their considerations of safety were social, political or economic. This was the position adopted by the District Judge, mandated (he felt) by Varig, in Finding of Fact V as follows:

> In making professional aviation decisions with respect to the preparation of the departure procedure, Cromwell was authorized only to consider the safety of the procedure and not social, political, or economic considerations other than safety.

Since the purpose of the FAA is to promote safety, every decision of every FAA employee is based on considerations of safety. If this kind of blanket is to be bestowed on the FAA it would be, in effect, a judicial repeal of the FTCA as to the FAA. It would also be inconsistent with a long line of cases holding that conduct of air traffic controllers is not immune. Eastern Airlines v. Union Trust Co., 221 F.2d 62 (D.C. 1955) cert. granted, and affirmed 350 U.S. 61 (1955); United States v. Furumizo, 381 F.2d 965, 967 (9th Cir. 1967); United States v. Murray, 463 F.2d 208 (10th Cir. 1972); Griffin v. United States, 500 F.2d 1059, 1064 (3d Cir. 1974). Conduct of air traffic controllers in directing air traffic involves discretion and it involves safety but it has not in the past been held immune because air traffic

control instructions "have not involved policy judgments as to the public interests." Griffin supra at 1064.

CONCLUSION

This petition for a writ of certiorari should be granted to resolve the important and unresolved issue as to whether there is a blanket grant of absolute immunity under the FTCA for the conduct of Government employees carrying out a safety program even though the specific conduct in questions does not involve social, political or economic considerations.

Respectfully submitted,

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JANUARY 1988

APPENDIX A

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NO. CIV.S-76-138 RAR
CIV.S-77-590 RAR
(CONSOLIDATED)

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER GRANTING JUDGMENT

NAOMI RUTH WEST, et al.,
Plaintiffs,
v.
UNITED STATES OF AMERICA,
Defendant.

DULCY STEINLAUF, etc., et al.,
Plaintiffs,
v.
UNITED STATES OF AMERICA
Defendant.

NAME OF JUDGE - RAUL A. RAMIREZ

This cause came on regularly to be heard by way of Court trial before the Honorable Raul A. Ramirez on April, 2, 3 and 24, 1981. Marshall L. Foreman, Jr., Esq. appeared as counsel for plaintiff, NAOMI RUTH WEST, et al.; Terry O'Reilly,

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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Esq. appeared as counsel for plaintiff, DULCY STEINLAUF, etc., et al.; ronnie G. Caplane, Esq. appeared as counsel for defendant, UNITED STATES OF AMERICA. Upon reviewing and considering the unverified complaints, the memorandum of points and authorities submitted by respective counsel, the sworn testimony of various witnesses, the exhibits marked and received into evidence at the time of trial, and the respective arguments of counsel, the Court now makes the following Findings of Fact, Conclusions of Law, and Order Granting Judgment pursuant to Rule 52, Federal Rules of Civil Procedure:

FINDINGS OF FACT

I

Jurisdiction of the action is conferred upon the Court pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C. § 1346(b), et seq.

II

Venue is uncontested and is proper inasmuch as the acts complained of occurred within the Eastern District of California.

III

The consolidated actions referred to herein are actions for wrongful death arising out of the crash of a Sierra Pacific Airline Convair 340/440 charter flight, which occurred near Bishop, California on March 13, 1974.

IV

All 36 passengers and crew died in the aforementioned crash. The heirs of decedents, WEST and STEINLAUF, both of whom were employees of the airlines, represent the consolidated actions brought against the UNITED STATES OF AMERICA.

V

The subject airplane crash occurred on March 13, 1974, at or about 8:28 p.m. in the White Mountains, approximately 5.2 miles southeast of the Bishop Airport at an altitude of 6,100 feet above sea level -- 2,000 feet above the elevation of the Bishop Airport.

VI

The crew of Flight 802 consisted of a Captain, First Officer and a Flight Attendant. Both the Captain and the First Officer were air transport rated pilots, a rating which, when given by the Federal Aviation Administration, is the highest rating a pilot can achieve.

VII

Prior to March 13, 1974, the Captain of Flight 802 had flown into Bishop Airport eight times during the previous six month period. Three of the flights in questions

were conducted at night and within ninety days of the accident.

VIII

Prior to March 13, 1974, the First Officer had flown into bishop Airport five times within ninety days of the accident, one of which was at night.

IX

In regard to the activities of the Captain and First Officer as referred to in Paragraphs VII and VIII, supra, there was no evidence presented at trial as to whether the Captain or the First Officer had ever flown out of Bishop Airport at night.

X

Flight 802 initially departed Hollywood Burbank Airport at 6:14 p.m. When in the vicinity of Bishop, the crew radioed the FAA Flight Service Station at Tonapah, Nevada and "air filed" an Instrument

Flight Rules flight plan for the return trip from Bishop to burbank. The proposed routing was listed as "VFR-direct Bishop (VOR), IFR-Bishop (VOR), direct Friant (VOR), V459 Lake Hughes (VOR), V165 Lang (VORt, direct."

XI

When operating under Instrument Flight Rules (IFR), a pilot is required to file a flight plan with an Air Route Traffic Control Center indicating the airways the pilot will be taking on a given flight and the procedures that will be followed. Once the flight plan is activated, the airplane is under the jurisdiction of an Air Route Traffic Control Center and cannot change its plan without approval by the center.

XII

The last official surface weather observation taken at Bishop occurred at

7:56 p.m. and indicated visibility of 30 miles, an estimated ceiling of 25,000 feet broken, and winds of 11 kilometers from 160 degrees.

XIII

The evening of March 13, 1974 was an extremely dark night with no moon. The sky was partially cloud covered. Because of darkness neither the mountains nor the horizon skyline was visible. There were no ground lights east of the airport.

XIV

Bishop Airport does not have a control tower and no permission or clearance is required for take-off.

XV

Elevation of the Bishop Airport is 4,120 feet.

XVI

The only air navigation facility at Bishop is a VOR radio station. There was

no distance measuring equipment (DME) installed at Bishop.

XVII

Bishop Airport is located two miles east of Bishop, California. Runway 16/34 is equipped with medium intensity runway lights with 30 watt bulbs. The other runways were unlighted.

XVIII

Bishop Airport lies in a deep, funnel shaped valley bounded on the West by the Sierra Nevada Mountains and on the east by the White Mountains. The valley to the south of Bishop is about seven miles wide. At Bishop, and to the north, the valley widens to about twelve miles. The terrain to the east of the airport begins to rise rapidly at about three and one-half miles and to the West of the airport at about eight miles. The valley floor at Bishop to the south is flat with an aver-

age elevation of about 4,100 feet. The floor to the north is composed of volcanic tableland that rises slowly in elevation. The highest terrain near the airport is the range of foothills and mountains to the east.

XIX

High terrain in all directions from the airport intrudes into the 40 to 1 slope that the FAA has determined to be the minimum for safe flight under instrument conditions.

XX

A Flight Service Station assists pilots by providing weather reports and relaying IFR clearance requests and information between pilots and control centers.

XXI

At approximately 8:21 p.m. on March 13, 1974, the crew of Flight 802 contacted the Tonapah Service Station by radio and

advised that they were taxiing for departure from Bishop and requested that their Instrument Flight Rules clearance be activated.

XXII

At approximately 8:24 p.m., having departed from Bishop Airport Runway 12, Flight 802 again contacted Tonapah Service Station by radio and advised that they were off at Bishop at 2020 and were "Climbing VFR over Bishop, awaiting clearance."

XXIII

FAA employees at the Tonapah Flight Service Station received Flight 802's air traffic control clearance from Oakland Air Traffic Control Center, but were unable to contact Flight 802 by radio, and as such, broadcast the clearance in the blind.

XXIV

Flight 802 struck the north slope of a mountain ridge approximately 5.2 statute miles southeast of the Bishop Airport at an elevation of 6,100 feet. The top of the ridge runs generally east to West and is 6,280 feet above sea level.

XXV

Based on the reports of the Tonapah Flight Service Station and several ground witnesses who saw an explosion and fire in the White Mountains, it is estimated that the crash of Flight 802 occurred at or about 8:28 p.m.

XXVI

At impact the aircraft was on a hearing of 175° magnetic in a 25° right wing down altitude.

XXVII

The aircraft did not suffer any pre-impact mechanical malfunction. The

engines were operating at a normal climb power setting, the altimeters were indicating the correct altitude and the heading indicators were indicating the correct heading. There was no inflight fire.

XXVIII

The VOR navigation receivers were properly set for the published instrument departure from Bishop.

XXIX

There was no indication that the flight crew had any awareness of the impending accident.

XXX

The departure procedure for Bishop Airport was published in the Federal Register and was current at the time of this accident. The procedure was as follows:

> Climb visually within 2 NM of Bishop Airport to cross

BIH VOR at or about 8,000', climb southeast and on R-140 to 10,000', turn left, proceed to BIH VOR continuing climb in a one minute holding pattern on R-140 (320° inbound), right turns to the following MCA's: Northwest and direct to Nichols Int. 13,000'; northbound direct to OAL VOR, 15,000'; southwest and direct to FRA VOR, 15,000'."

XXXI

The departure procedure heretofore mentioned included a visual segment and an instrument segment. The visual segment was from the ground to 8,000 feet msl. The instrument segment was from 8,000 feet and above after being established on the 140 degree radial. The procedure required navigation over the ground during the visual segment by visual reference to objects on the ground and during the instrument segment by electronic radio navigation instruments in the airplane receiving signals from the ground.

XXXII

The departure procedure implies a circular flight path around the Bishop Airport during the visual segment.

XXXIII

A prudent pilot flying a visual segment of a departure procedure relies not only on visual cues but also on cockpit instruments for information such as altitude, turn bank, vertical speed, air speed and climb.

XXXIV

There was no instruments on board Flight 802 that would have indicated to the pilots that they were drifting outside the two nautical mile arc prescribed in the visual segment of the departure procedure.

XXXV

No specific procedures are set forth in the Sierra Pacific Airlines operations

manual for performing the visual segment of the departure from the Bishop Airport, but it was the consensus of the Sierra Pacific flight crews that the initial turn would be a right turn toward the town of Bishop after take-off.

XXXVI

The first segment of the published IFR departure procedure from Bishop is "Climb visually within 2nm (nautical mile) of Bishop Airport to cross BIH VOR at or about 8,000°. . ."

XXXVII

Although the first segment of the departure procedure specifies a visual climb, the procedure itself is an IFR procedure.

XXXVIII

A pilot departing Bishop on an active IFR flight plan is required to follow either the published IFR procedure or an

alternative approved by the Air Route Traffic Control Center.

XXXIX

Sierra Pacific Airlines Operations Specifications, issued by the FAA pursuant to 14 CFR Part 121, and the Sierra Pacific Airlines Operations Manual, approved by the FAA pursuant to 14 CFR Part 121, required that the Flight Crew follow published departure procedures.

XL

There is a visual phenomena or optical illusion commonly referred to as the "Black Hole Illusion" in which experienced pilots can become disoriented regarding their position from an airport and height above ground due to extreme darkness, lack of a horizon and absence of ground lights below the aircraft. This phenomena is known to occur in approaches to an airport but the physiological and anatomical

reasons that cause this phenomena on approaches also operate in departures where navigation is by visual reference to ground lights.

XLI

Although the Convair 340/440 aircraft has ample maneuverability to climb to 8,000 feet and stay within two nautical miles of the Bishop Airport, the procedure is achieved by the pilot and the co-pilot's reference to visual cues of the airport and the city lights as well as reference to various instruments on board the aircraft.

XLII

It is more probable than not that the cause of this accident was disorientation of the flight crew regarding their position from the airport and height above the ground due to extreme darkness, inability to see the mountains, lack of a

horizon and absence of ground lighting east of the airport.

XLIII

The IFR departure procedure from Bishop Airport was prepared by an employee of the Federal Aviation Administration, an agency of the United States of America, who was acting in the course and scope of his employment.

XLIV

Paul Cromwell is the only FAA employee who participated in the preparation of the IFR departure procedure from Bishop Airport.

XLV

The visual segment of the published IFR departure procedure from the Bishop Airport in effect at the time of the accident created an unreasonable risk of flight crew disorientation during hours of darkness when there was no ambient light

and the mountains and horizon were not visible.

XLVI

FAA employee Paul Cromwell prepared the IFR departure procedure from Bishop Airport by reference to various airport layout plans, surveys and topographic charts; he did not visit the site or look at aerial photographs of Bishop Airport nor did he make inquiry of anyone at Bishop Airport regarding local conditions. Although Mr. Cromwell knew that visual illusions could occur on approaches to an airport on a dark night with no ambient light and with sparse ground lighting, he did not make any investigation of the ground lighting to the east of the airport to determine if there was a risk of a similar visual illusion occurring during the visual segment of the instrument departure from Bishop Airport.

XLVII

The rules and regulations of the Federal Aviation Administration in effect when Paul Cromwell prepared the departure procedure required that he exercise good judgment in preparing the visual segment of the instrument departure procedure.

XLVIII

Good judgment in preparing the instrument departure procedure from the Bishop Airport requires consideration of whether the pilot has means to perform the visual segment of the departure procedure, whether is any undue risk of error and whether there is an adequate safety margin.

XLIX

When Paul Cromwell prepared the departure procedure for Bishop Airport, he did not consider whether there was an undue risk of pilot error or whether there

existed an adequate safety margin in the visual segment of the procedure.

L

Paul Cromwell did not exercise ordinary care in preparing the visual segment of the departure procedure because he did not consider, investigate or evaluate the risk of visual illusions to which the flight crew might be subjected on a dark night with no ambient lighting, no visual horizon and no ground lights east of the airport.

LI

Lloyd J. Anderson was employed by the FAA as a pilot and flew the commissioning flight checks for the Bishop VOR. Anderson did not fly any checks at night nor did he investigate the lighting east of the airport or make any check for safety of the visual segment of the IFR departure other than to look for tele-

vision and radio towers and other such obstructions within the two mile arc.

LII

Lloyd J. Anderson did not exercise ordinary care in flight checking the safety of the visual segment of the instrument departure procedure from the Bishop Airport.

LIII

At the time of this accident, Sierra Pacific Airlines was a common carrier by air authorized by the FAA to operate Convair 340/440 type aircraft into and out of the Bishop Airport at night pursuant to Operations Specifications issued by the FAA under 14 CFR Part 121.

LIV

Sierra Pacific Airlines could not lawfully operate the Convair 340/440 airplane into and out of Bishop Airport at night without FAA authorization and approval.

LV

Between November 17, 1972 and October 1, 1973 Paul C. Thornberry was employed by the FAA as an Air Carrier Operations Inspector assigned to Sierra Pacific Airlines.

LVI

Mr. Thornberry is the person who approved the first air carrier Operations Specifications for Sierra Pacific Airlines for the Convair 340/440 airplane.

LVII

Before authorizing Sierra Pacific Airlines to operate the Convair 340/440 out of Bishop Airport at night, an FAA evaluation should have been made to include nighttime proving flights under various conditions with an FAA air carrier inspector present on those flights.

LVIII

The Federal Aviation Administration did not make any proving flight at night from the Bishop Airport in a Convair 340/440 airplane.

LIX

The FAA employee who authorized and approved Sierra Pacific Airlines' use of bishop Airport for night departures in the Convair 340/440 type airplane did not exercise ordinary care.

LX

The Federal Aviation Administration was under no duty to publish a departure procedure for Bishop Airport but voluntarily assumed that duty and in so doing engendered reliance by the flying public on the safety of the published procedure.

LXI

Preparation and flight check of the departure procedure by FAA employees were activities at an operational level and not at a policy making level.

LXII

The Federal Aviation Administration was under no duty to authorize or approve Sierra Pacific Airlines' use of Bishop Airport for night departures but voluntarily assumed that duty and in so doing engendered reliance by the flying public on the safety of that use.

LXIII

Authorization and approval of Sierra Pacific Airlines' use of Bishop Airport for night departures was at an operational level and not at a policy making level.

LXIV

The negligence of the employees of the Federal Aviation Administration acting in

the course and scope of their employment was a proximate cause of the death of Harold Robert West and James Steinlauf.

CONCLUSIONS OF LAW

I

Pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C. §1346(b), et seq., this Court has jurisdiction of the subject matter of this action and of the parties.

II

In accordance with the provisions of the Federal Tort Claims Act, 28 U.S.C. §1346(b), et seq., the substantive law which the Court applied in deciding the issues herein is the law of the State of California.

III

As a general rule, liability under the Federal Tort Claims Act cannot be predicated upon the exercise or performance or

the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved is abused. 28 U.S.C. §2680(a).

IV

Decisions made at the planning or policy level as distinguished from those made at an operational level are within the discretionary function exception to the Federal Tort Claims Act. United Airlines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964). Dalehite v. United States, 346 U.S. 15 (1953).

V

In the case at bar, the preparation and flight check of the departure procedure as well as the authorization and approval of Sierra Pacific Airlines' use of Bishop Airport for nighttime departures were activities at the operational level as

opposed to the policy making leve. United Airlines, Inc. v. Weinter, supra; Indian Towing Co. v. United States, 350 U.S. 61, 100 L.Ed. 48 (1955).

VI

While the "discretionary function" exception may exempt the United States from liability for not providing any departure procedure at all, once the decision to design the departure procedure and require Sierra Pacific Airlines to adhere to said procedure has been made, the United State is under a duty to exercise due care to insure that the procedure is safe and to discover unsafe conditions and thereafter correct said conditions. As states in Fair v. United State, 234 F.2d 288, 294 (5th Cir. 1956):

> [I]f the government undertakes to perform certain acts or functions thus engendering reliance thereon, it must perform them with due care; that

> obligation of due care extends to the public and to the individuals who compose it . . . .

VII

Plaintiffs have the burden of proving that the United States was negligent not only in the preparation of the published departure procedure, but also in the authorization and approval of nighttime departures from Bishop Airport and, furthermore, that said negligence was the proximate cause of the accident. Wenzel v. United States, 419 F.2d 260 (3rd Cir. 1969).

VIII

Before finding the United States liable for negligent preparation and flight check of the departure procedure as well as negligent authorization and approval of nighttime departures from Bishop Airport, the standards for "good samaritan" liability must be applied according to

appropriate state law. Under such a standard, plaintiffs have the burden of first proving that the United States was negligent in granting the certification of the airlines to operate under the given circumstances; once plaintiffs have established negligent certification, they then have the burden of proving that the certification increased the risk of harm or that the damage resulted from decedent's reliance on said certification. United Scottish Ins. Co. v. United States, 614 F.2d 188 (9th Cir. 1979). In citing Indian Towing, supra, the Court in United Scottish held at 614 F.2d 194:

> "In that case, the court ruled that the government could be held liable for its negligent operation of a lighthouse pursuant to the so-called "good samaritan" doctrine, As the court stated, "one who undertakes to warn the public of danger and

> thereby induces reliance, must perform his 'good samaritan' task in a careful manner." (Emphasis in original)

IX

The law of the State of California with respect to the duty of care imposed on a "good samaritan" is clear and well established. As set forth in California's Book of Approved Jury Instruction (BAJI), Section 4.45:

> VOLUNTARY UNDERTAKING - "GOOD SAMARITAN RULE"
> One who is under no duty to care for or render service to another but voluntarily assumes such duty is subject to liability to the other for injury proximately caused by a failure to exercise ordinary or reasonable care in the performance of such assumed duty.

X

When the FAA voluntarily undertook to design and require adherence to a departure procedure from Bishop Airport,

it became subject to liability for failure to exercise ordinary or reasonable care in the performance of said assumed duty and in failing to insure that the procedure was safe under all foreseeable circumstances with an adequate margin of safety for human error. Foss v. United States, 623 F.2d 104 (9th Cir. 1980).

XI

In this regard, plaintiffs have clearly demonstrated that the United States was negligent in certifying Sierra Pacific Airlines and that there was detrimental reliance on that certification by plaintiffs' decedents.

XII

Plaintiffs have fully satisfied the burden of establishing that the negligence on the part of the defendant, UNITED STATES OF AMERICA, acting by and through the FAA and its employees, was the

proximate cause of the death of plaintiffs' decedents.

XIII

The Court further finds that the employees of the FAA were negligent in publishing a departure procedure for the Bishop Airport without investigating or evaluating the risk of pilot disorientation caused by extreme darkness and lack of visual ground references east of the airport.

XIV

The Court further finds that the employees of the FAA were negligent in authorizing Sierra Pacific Airlines to use the Bishop Airport for night departures without investigating or evaluating the risk of pilot disorientation caused by extreme darkness and lack of visual ground references east of the airport.

XV

The United State had a separate duty of due care in the preparation of the departure procedures for Bishop Airport and said duty was not relieved by pilot negligence, if any. Stork v. United States, 278 F.Supp. 869 (S.D. Cal. 1967); Foss v. United States, supra.

XVI

To the extent that any of the foregoing Findings of Fact are deemed to be Conclusions of Law, or to the extent that the foregoing Conclusions of Law are deemed to be Findings of Fact, the same shall be deemed Conclusions of Law or Findings of Fact, as the case may be.

XVII

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court herein concludes that plaintiffs are entitled to judgment as a matter of law

and that judgment should be entered on behalf of plaintiffs, and each of them, on the issue of liability.

IT IS SO ORDERED.

DATED: May 7, 1981

APPENDIX B

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CIVIL ACTION FILE NO.
S-76-138 RAR
S-77-590 RAR

STEINLAUF
vs.
U.S.A.

JUDGMENT

This action came on for trial before the Court, Honorable Raul A. Ramirez, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered, May 7, 1981.

It is Ordered and Adjudged that judgment is in favor of plaintiff and against defendant. Judgment is hereby entered accordingly.

Clerk: s/ J. R. Gindstaff,
Clerk of Court
s/ L. Wilson, Deputy Clerk
May 12, 1981

APPENDIX C

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NO. CIV.S-76-138 RAR

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER GRANTING
JUDGMENT RE DAMAGES

NAOMI RUTH WEST, et al.,

v.

UNITED STATES OF AMERICA

NAME OF JUDGE - RAUL A. RAMIREZ

The above-entitled case came on regularly to be heard on the limited issue of damages by way of court trial before the Honorable Raul A. Ramirez on August 10, 11, and 12, 1982. Marshall L. Foreman, Esq., appeared as counsel for plaintiffs, NAOMI RUTH WEST, et al., and Richard E. Peyser, Trial Attorney, Torts Branch, Civil Division, U. S. Department of Justice, appeared as counsel for

defendant, UNITED STATES OF AMERICA. Upon reviewing and considering the trial briefs submitted by respective counsel, the sworn testimony of various witnesses, the exhibits marked and received into evidence, and the respective arguments of counsel, the Court now makes the following Findings of Fact, Conclusions of Law, and Order Granting Judgment re Damages pursuant to Rule 52, Federal Rules of Civil Procedure:

FINDINGS OF FACT

I

Jurisdiction is conferred upon the Court pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C. §1346(b), et seq.

II

Venue is uncontested and is proper inasmuch as all acts complained of

occurred within the Eastern District of California.

III

The action herein designated as Naomi Ruth West, et al. v. United States of America, Civ.S-76-138 RAR was heretofore consolidated with action Civ.S-77-590 RAR, Dulcy Steinlauf, et al. v. United States of America, inasmuch as each case was one for wrongful death arising out of the crash of a Sierra Pacific Airline Conveyor 340/440 charter flight, which occurred near Bishop, California on March 13, 1974.

IV

By Pretrial Order of October 8, 1980, trial of each of the cases was bifurcated as to the issues of liability and damages.

V

On May 8, 1981, the Court rendered Findings of Fact, Conclusions of Law, and Order Granting Judgment in regard to each

of the above-entitled cases deciding the issue of liability adverse to the United States and retaining the issue of damages for further proceedings.

VI

Prior to the commencement of the trial on the limited issue of damages, counsel advised the Court that a settlement had been reached and confirmed in regard to Dulcy Steinlauf, et al. v. United States of America, Civ.S-77-590 RAR.

VII

Plaintiffs' decedent, Harold Robert West was 45 years of age at the time of his death, having been born on April 8, 1929.

VIII

At the time of his death, Harold Robert West had a life expectancy to age 74.1 and a work expectancy as an airline pilot to age 60.

IX

At the time of his death, Harold Robert West was in good health, was married to Naomi Ruth West for a period of 22 years, and was the father of three children, namely, Bruce Alan West, age 16; Brian Robert West, age 14, and Roberta Eileen West, age 10.

X

Plaintiff, NAOMI RUTH WEST, was 43 years of age at the time of decedent's death and herself died after the instant complaint was filed but prior to the time of trial. Pursuant to timely motion, Charles G. Beeler was substituted as personal representative of the estate of Naomi Ruth West, and therefore as plaintiff in place and stead of Naomi Ruth West.

XI

While the statistical life expectancy of a white female, age 43 years, is to age 79, a 43 year old white female with a history of breast cancer (a three centimeter mass with three positive nodes removed by a mastectomy, with no clinical recurrence four years after the mastectomy) has a thirty percent (30%) change of a fatal recurrence of the cancer within four to ten years after the mastectomy, although the thirty percent (30%) chance would continue on a downward sloping curve after the end of the ten year period.

XII

Having taken those matters into consideration as set forth in paragraphs X and XI, supra, including the Stipulation of Fact entered into by counsel at the time of trial, the Court finds the life expec-

tancy of decedent's wife, Naomi Ruth West, to be ten years.

XIII

Harold Robert West entered the United States Air Force in February 1953 and retired in February 1973 with the rank of major.

XIV

Harold Robert West was designated a United States Air Force Aviator and held an FAA Airline Transport Pilot Certificate.

XV

By reason of his service in the United States Air Force, decedent, Harold Robert West, was entitled to a military pension for his lifetime, which pension ended by reason of his death on March 13, 1974. At the time of his death, Harold Robert West was receiving a pension in the amount of $769.07 each month, which amount would

have been fixed in the future in accordance with the Consumer Price Index.

XVI

When decedent, Harold Robert West, retired from the United States Air Force, he exercised an option to accept a lesser lifetime position in return for an annuity which would pay his designated beneficiaries fifty-five percent (55%) of a base amount of $300.00, said base amount itself subject to cost of living adjustments.

XVII

The designated beneficiaries of the annuity were decedent's wife, Naomi Ruth West, or, in the event of her death, the surviving children of the marriage until each reached the age of 22 as a full time student.

XVIII

From and after the death of Harold Robert West, defendant paid to plaintiffs,

and each of them, or became required to pay to plaintiffs, and each of them, the total sum of $31,946.00, said sum representing the past value of annuity benefits paid to Naomi Ruth West, Bruce West, Brian West, and Roberta West, and the present value of future annuity due to be paid to Roberta West.

XIX

Approximately one month prior to date of his death, Harold Robert West was employed by Sierra Pacific Airlines as a Captain-in-Training at a salary of $600.00 per month.

XX

Completion of the training program for captains at Sierra Pacific Airlines in 1974 normally required approximately 60 days. Upon completion of the captains training program, the salary of a

beginning captain was approximately $1,200.00 per month.

XXI

In 1974, fringe benefits were made available to a captain at Sierra Pacific Airlines which included meals and lodging when away from the Los Angeles area, travel discounts on most airlines for the employee and family, and health and accident insurance for the employee and family.

XXII

Working hours for a Sierra Pacific Airlines captain were not to exceed 100 flight hours per calendar month, 30 flight hours each seven days or 8 flight hours each 24 hour period.

XXIII

Prior to the instant litigation plaintiffs, and each of them, brought an action for wrongful death in the Superior Court

of the State of California in and for the County of Los Angeles, said case bearing the title West, et al. v. Sierra Pacific Airlines, et al., Case No. 117025 alleging, inter alia, that it was unclear whether decedent was acting in the course and scope of his employment as an employee of Sierra Pacific Airlines at the time of his death.

XXIV

Pursuant to settlement of the case entitled West, et al. v. Sierra Pacific Airlines, et al., plaintiffs, and each of them, recovered a total amount of $66,880.00, said sum reflecting $46,000.00 as and for workers' compensation benefits and $20,880.00 as excess amounts payable so as to avoid the uncertainty of the outcome of litigation.

XXV

Funeral and related expenses incurred by reason of the death of Harold Robert West amounted to $3,778.07.

XXVI

Harold Robert West's will dated September 20, 1966, left all of his estate to Naomi Ruth West or, if she predeceased or died simultaneously with him, to all of the living children in equal shares.

XXVII

As a proximate result of the death of Harold Robert West, plaintiff, NAOMI RUTH WEST, suffered an economic loss with present value of $116,400.00 by reason of the lost retirement benefits to the time of trial, and an economic loss with present value of $308,251.00 for loss of retirement benefits in the future, or a total loss reduced due to the impact of federal

income taxation with the present value of $424,651.00.

XXVIII

As a further proximate result of the death of Harold Robert West, plaintiff, NAOMI RUTH WEST, suffered an economic loss with present value of $170,644.00 by reason of the lost income plus fringe benefits of decedent's employment with Sierra Pacific Airlines to the time of trial, and an economic loss with present value of $172,402.00 by reason of the lost income plus fringe benefits of decedent's employment with Sierra Pacific Airlines in the future, or a total loss reduced due to the impact of federal income taxation with the present value of $343,046.00.

XXIX

As a further proximate result of the death of Harold Robert West and the resulting loss of decedent's assistance in

the operation and maintenance of the parties' home, and furthermore as a result of the Court having found the life expectancy of decedent's wife, Naomi Ruth West, to be ten years, the Court now finds the reasonable value of household services lost to Naomi Ruth West to be the sum of $31,896.00.

XXX

The present value of the total economic loss suffered by the plaintiff, NAOMI RUTH WEST, as a proximate result of the death of decedent, Harold Robert West, is as follows:

(1)	Retirement benefits, past and future.....	$424,651.00
(2)	Income and fringe benefits, past and future.....	$343,046.00
(3)	Reasonable value of household services, past and future.....	$ 31,896.00
(4)	Funeral and related expenses.....	$ 3,778.00
	TOTAL LOSS.....	$803,371.00

XXXI

Plaintiffs' decedent, Harold Robert West, would have utilized approximately forty-five percent (45%) of the $654,491.00 for his personal consumption needs, resulting in a net after tax economic loss to plaintiff, NAOMI RUTH WEST, in the present value sum of $441,854.00.

XXXII

As a further proximate result of the death of plaintiffs' decedent, Harold Robert West, plaintiff, NAOMI RUTH WEST, was deprived of the love, companionship, comfort, affection, society, solace, and moral support of decedent. Although decedent was an individual who possessed and demonstrated unique and exceptional characteristics in regard to professional accomplishment, the evidence clearly demonstrates that decedent did in fact spend much of his time, when able, in assisting

his spouse as a loving companion, friend and associate in the raising and instruction of the three minor children of the marriage. In short, the evidence demonstrates that decedent exhibited a warm, affectionate and loving disposition towards his spouse, created an atmosphere of cooperation and assistance with his spouse in maintaining a "good solid marriage", and exhibited mutual respect and an attitude of putting the family first above all other matters whenever possible. For all of these reasons, the Court finds that plaintiff, NAOMI RUTH WEST, has suffered general damages as a result of the untimely death of decedent in the sum of $100,000,00.

XXXIII

As a further proximate result of the death of Harold Robert West, plaintiffs, Bruce Alan West, Brian Robert West, and

Robert Eileen West, were deprived of the love, companionship, comfort, affection, society, solace and moral support of said decedent. In this regard, the Court takes notice of the tender age of each of the children at the time of decedent's death, and more importantly, the fact that decedent was greatly involved in terms of rendering unto these children advice, guidance, training, and moral as well as monetary support. Additionally, the Court take notice of decedent's active participation with his children in a variety of activities including Boy Scouts, Girl Scouts, Little League, skiing, camping, fishing, and other incidents of parental involvement too great in number to mention. Finally, the Court finds and is persuaded by the evidence that decedent was a kind, loving father who, although a strict disciplinarian, provided the

children with continuing advice, companionship, counsel, moral support, protection, instruction and intellectual training. For all of these reasons, the Court does find for the plaintiffs, and each of the, in the following regards:

(1) For plaintiff, Bruce Alan West, born September 16, 1957, general damages in the sum of $60,000.00;

(2) For plaintiff, Brian Robert West, born February 25, 1960, general damages in the sum of $75,000.00;

(3) For plaintiff, Brian Robert West, born April 9, 1963, general damages in the sum of $90,000.00.

In total, the Court does herein find that plaintiffs, Bruce Alan West, Brian Robert West, and Roberta Eileen West, have suffered general damages as a result of the death of the decedent in the total sum of $225,000.00 as apportioned herein.

CONCLUSIONS OF LAW

I

The Federal Tort Claims Act holds the United States liable "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. §2674, on claims against the government for personal injury "caused by the negligent or wrongful act ... [of its employees] while acting within the scope of [their] ... employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," 28 U.S.C. §1346(b).

II

In accordance with the provisions of the Federal Tort Claims Act, and inasmuch as the tort in the instant action took place within the State of California, the

substantive law which the Court applied in deciding the measure of damages is in fact the law of the State of California.

III

As a general rule, in calculating wrongful death damages under the Federal Tort Claims Act, the court must calculate the future earnings the decedent could have expected over his life work expectancy, deduct taxes and other amounts the decedent would or could not have contributed, and, discount this amount to its present value. Carr v. Pacific Telephone Co., 26 Cal.App.3d 537 (1972); United States v. English, 521 F.2d 63 (9th Cir. 1975).

IV

Under California law, damages in a wrongful death action are limited by the terms of California Code of Civil Procedure §377 which provides in part that

"such damages may be given as under all the circumstances of the case, may be just ..." California courts have consistently held that only losses of a pecuniary nature are compensable, Estate of D'India, 63 Cal.App.3d 942 (1976); Syah v. Johnson, 247 Cal.App.2d 534 (1966) and, accordingly, neither punitive damages nor damages for grief and sorrow are recoverable. Krouse v. Graham, 19 Cal.3d 59 (1977).

V

Under California law, the heirs of the decedent may recover for the pecuniary loss of present and probable future benefits of any kind which exhibit (1) the present value of future earnings; (2) the value of any personal service, advice or training that would probably have been given; (3) the value of the decedent's society and companionship. Carr v.

Pacific Telephone Co., supra; Krouse v. Graham, supra; Griott v. Gamblin, 194 Cal.App.2d 577 (1961); 4 Witkin, Summary of Cal. Law, Torts §891 (8th ed., 1974).

VI

Under California law, where the decedent was a husband and a father, the chief element of damages is the present value of the earnings said decedent would have contributed to the family during the period of his life expectancy. Therefore, where a widow sues for the death of her husband, the pecuniary loss, as in other death cases, is to be determined on the basis of conditions existing at the time of the decedent's death, as opposed to subsequent resulting conditions. Cavallaro v. Michelin Tire Corp., 96 Cal.App.3d 95 (1979); Wood v. Alves Service Transportation, Inc., 101 Cal.App.2d 723 (1961).

VII

Under California law, a spouse is entitled to recover the reasonable value of any and all household services lost to said spouse by reason of the untimely death of the decedent as well as any and all funeral, memorial and burial expenses reasonably paid or incurred. Krouse v. Graham, supra; Gibson v. State of California, 184 Cal.App.2d 6 (1960); Francis v. Sauve, 222 Cal.App.2d 102 (1963).

VIII

Under California law, benefits received from a source other than the defendant may not be taken into consideration to reduce damages. Hrnjak v. Graymar, Inc., 4 Cal.3d 725 (1971). Upon the untimely death of decedent, plaintiffs, as beneficiaries, became entitled to an annuity equal to fifty-five percent (55%) of the

base amount of $300.00. The payment of the annuity was a result of decedent's exercise of an option to accept a lesser lifetime pension, which in effect, qualifies the annuity as having been purchased by decedent with what amounted to monthly deductions from his retirement pay. As such, the payment of the annuity is similar to benefits paid by the United States from a special fund supplied in part by the beneficiary or relative upon whom the beneficiary is dependent. Abille v. United States, 482 F.Supp 702 (1980).

IX

As a result of the Conclusion as set forth in paragraph VIII, supra, the present award made pursuant to the Federal Tort Claims Act will not be reduced by the amount of benefits paid by the United States to the heirs of decedent and will not be an offset against the lost pension

of said decedent which would have been larger had it been limited to decedent's life with no survivor annuity. United States v. Brown, 348 U.S. 110 (1954); United States v. Hayashi, 282 F.2d 599 (9th Cir. 1960); Abille v. United States, supra.

X

Under California law an employer may recover from a third party tortfeasor any and all amounts paid to the injured employee on account of workers' compensation benefits, Cal. Lab Code §3852. The employer may obtain said reimbursement from the third-party tortfeasor by suing independently of the injured employee, by suing jointly with the injured employee, or by imposing a lien upon the injured employee's judgment, 2 Witkin, Summary of Cal. Law, Workmen's [sic] Compensation §§29, 31 (8th ed., 1973). In any event,

the injured employee only receives from the third-party tortfeasor the amount of his damages in excess of the amount received as workers' compensation benefits.

XI

Under California law, an employer whose own negligence was a proximate cause of the employee's injuries cannot recover reimbursement from the third-party tortfeasor because such recovery would insulate the employer from the consequences of his own wrong-doing. Furthermore, in order to prevent a double recovery on the part of the injured employee, the third-party tortfeasor is entitled to a reduction or setoff of any and all amounts previously paid by the negligent employer to the injured employee. In short, California law attempts to leave the plaintiff where he stood before the injury, and to

apportion the damages between the third-party tortfeasor and the negligent employer. Witt v. Jackson, 57 Cal.2d 57 (1961).

XII

As previously indicated, under California law, the fact which entitles the third-party tortfeasor to a reduction of a judgment rendered against him is the contributory negligence of the employer. In absence of such wrongdoing, however, the third-party tortfeasor may be liable not only to the injured employee but also to the employer for the entire judgment, De Cruz v. Reid, 69 Cal.2d 217 (1968). If for reasons other than contributory negligence, the employer waives his right to impose a lien on the injured employee's recovery from the third-party tortfeasor, said waiver has no bearing on the liability of the third-party tortfeasor.

In short, any amounts recovered by the employee on account of workers' compensation benefits are treated as a collateral source, in which the third-party tortfeasor has no interest, Id.

XIII

Because the contributory negligence of the employer is an affirmative defense, it must be pled and proved by the third-party tortfeasor, De Cruz v. Reid, supra; Patterson v. Sharp, 10 Cal.App.3d 990, 996 (1970); Brandon v. Santa Rita Technology, Inc., 25 Cal.App.3d 838 (1972). In the present case, the alleged contributory negligence of decedent's employer, Sierra Pacific Airlines, was neither pled nor proved by the defendant herein. Additionally, the alleged contributory negligence of the employer was never raised by reason of present defendant's Pretrial Statement nor the Court's Final Pretrial Order. The

only evidence proffered on the issue of contributory negligence on the part of decedent's employer was a Petition and Order for Compromise of Minor's Claim filed in the Superior Court of the State of California in and for the County of Los Angeles (see defendant's Exhibit "C"). This document demonstrates that the plaintiffs herein received $46,000.00 on account of workers' compensation benefits, and $20,880.00 on account of a compromise of the litigation on the status of the plaintiff's decedent at the time of his death. Since settlement by an employer is not an admission of negligence, however, the document cannot be relied upon to establish the third-party tortfeasor's right to a reduction in the judgment. Correll v. Clark Equipment Co., 76 Cal.App.3d 548 (1978).

XIV

The settlement of the workers' compensation claim effected by the settlement of the Los Angeles Superior Court action did not contain the express waiver of the employer's right to reimbursement contained in the settlement agreement construed in De Cruz v Reid, supra. It cannot, however, be construed in any other way. The Petition and Order for Compromise of Minor's Claim specifically provides that the plaintiffs "will be allowed to retain the .. Workmens [sic] Compensation Benefits previously paid by the State Compensation Insurance Fund ...." It appears to this Court that the settlement of the Superior Court action, read as a whole exudes an understanding between the plaintiffs and the decedent's employer that the monies paid in settlement of the plaintiffs' claims

were in addition to any recovery which plaintiffs might recieve from the third-party tortfeasor.

XV

On the authority of De Cruz v. Reid, supra, the failure of the third-party tortfeasor to plead and prove the contributory negligence of the decedent's employer precludes its claim for a reduction of the judgment to which the plaintiffs are otherwise entitled. The recovery obtain by the plaintiffs in their state action from the decedent's employer is, so far as the defendant is concerned, recovery from a collateral source.

XVI

A different result obtains, however, with respect to the $20,880.00 recovered by the plaintiffs in settlement of their litigation against the decedent's employer. This sum was in addition to the

workers' compensation benefits to which the plaintiffs were entitled and therefore must be treated as recovery for the injuries for which the plaintiffs are now suing the defendant. California has a prohibition on double recovery by the plaintiffs, see Witt v. Jackson, supra. Accordingly, the defendant is entitled to a setoff in the amount of $20,880.00.

XVII

As a proximate result of the death of plaintiff's decedent, Harold Robert West, plaintiff, NAOMI RUTH WEST, suffered an economic loss comprised of lost retirement benefits, lost income and fringe benefits, lost value of household services, and funeral related expenses with a present value in the sum of four hundred forty one

thousand eight hundred fifty four dollars ($441,854.00).

XVIII

As a further proximate result of the death of plaintiffs' decedent, Harold Robert West, plaintiff, NAOMI RUTH WEST, suffered general damages by reason of the loss of love, companionship, comfort, affection, society, solace and moral support in the sum of one hundred thousand dollars ($100,000.00).

XIX

As a further proximate result of the death of plaintiffs' decedent, Harold Robert West, plaintiff, BRUCE ALAN WEST, suffered general damages by reason of the loss of love, companionship, comfort, affection, society, solace and moral support in the sum of sixty thousand dollars ($60,000.00).

XX

As a further proximate result of the death of plaintiffs' decedent, Harold Robert West, plaintiff, BRIAN ROBERT WEST, suffered general damages by reason of the loss of love, companionship, comfort, affection, society, solace and moral support in the sum of seventy five thousand dollars ($75,000.00).

XXI

As a further proximate result of the death of plaintiffs' decedent, Harold Robert West, plaintiff, ROBERTA EILEEN WEST, suffered general damages by reason of the loss of love, companionship, comfort, affection, society, solace and moral support in the sum of ninth thousand dollars ($90,000.00).

XXII

Pursuant to the provisions of 31 U.S.C. §724(a), plaintiffs, and each of them, are

entitled to interest on any and all final judgments rendered against the United States in actions institute pursuant to the provisions of the Federal Tort Claims Act computer as follows:

> "[T]hat interest on a judgment of a district court to which the provisions of §2411(b) of Title 28 apply, payable from this appropriation, shall be paid only when such judgment becomes final after review on appeal or petition by the United States, and then only from the date of the filing of the transcript thereof in the General Accounting Office to the date of the mandate of affirmance...."

XXIII

That as a result of the computations made in Paragraphs XVI, XVII, XVIII, XIX, XX, XXI, supra, plaintiffs, and each of them, are entitled to a total award of damages as and against defendant, UNITED STATES OF AMERICA, in the sum of seven hundred forty five thousand nine hundred

seventy four dollars ($745,974.00) plus costs as permitted by law.

XXIV

To the extent that any of the foregoing Findings of Fact are deemed to be Conclusions of Law, or to the extent that any of the foregoing Conclusions of Law are deemed to be Findings of Fact, the same shall be deemed Conclusions of Law or Findings of Fact as the case may be.

XXV

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court herein concludes that plaintiffs are entitled to judgment as a matter of law and that judgment should be entered on behalf of plaintiffs, and each of them, on the issue of damages as specifically set forth herein.

IT IS SO ORDERED.

DATED: October 29, 1982.

APPENDIX D

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NO. CIV.S-76-138 RAR

NAOMI RUTH WEST, et al.,

v.

UNITED STATES OF AMERICA

NAME OF JUDGE - RAUL A. RAMIREZ

This action came on for trial before the Court, Honorable Raul A. Ramirez, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, October 29, 1982.

IT IS ORDERED AND ADJUDGED

that Judgment is in favor of the Plaintiffs and against the Defendant. Judgment is hereby entered accordingly.

Clerk: s/ Marianne Matherly, Deputy Clerk
November 2, 1982

APPENDIX E

JUDGMENT IN A CIVIL CASE

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

Nos. 83-1533, 83-1893
DC# CIV.S-76-138
CV S-77-590 RAR
Eastern California
(Sacramento)

ORDER

NAOMI RUTH WEST, et al.,
Plaintiffs-Appellees,

vs.

UNITED STATES OF AMERICA
Defendant-Appellant.

Before: GOODWIN and WALLACE,
Circuit Judges

Appellees' motion for a limited remand is granted. Appeal 83-1533 is remanded to the district court for forty-five (45) days from the entry of this order for the limited purpose of vesting the district court with jurisdiction to rule on appellees' Fed. R. Civ. P. 60(b) motion.

Appellant may seek leave to file a supplemental opening brief on or before fourteen (14) days after the district court's decision on the 60(b) motion. If appellant is granted leave to file a supplemental brief appellees shall file their brief pursuant to the schedule set forth in Fed. R. App. P. 31(a). If appellant does not seek leave to file a supplemental brief, appellees shall file their brief on or before twenty-eight (28) days from the district court's decision on the 60(b) motion.

Appellant's motion to consolidate West v. United States, 83-1533 and Steinlauf v. United States, 83-1893 is granted. Appellant's motion reflects that there are no additional issues in the latter appeal. Appellant's opening brief filed in 83-1533 shall be deemed applicable to appeal 83-1893. Appellant shall file a

supplemental excerpt of record on or before fourteen (14) days from the entry of this order.

Clerk: s/ Phillip B. Winberry
June 7, 1983

APPENDIX F

JUDGMENT IN A CIVIL CASE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 83-1533, 83-1893
D.C. Nos. CIV.S-76-138
and CV-S-77-590 RAR

ORDER

NAOMI RUTH WEST, et al.,
Plaintiffs-Appellees,

vs.

UNITED STATES OF AMERICA
Defendant-Appellant.

Before: GOODWIN, Circuit Judge

The time in which the district court may dispose of the pending Rule 60(b) motion is extended until September 6, 1983.

Clerk: s/ Phillip B. Winberry
June 30, 1983

APPENDIX G

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Docket Number CIV.S-76-138 RAR

AMENDED

NAOMI RUTH WEST, et al.,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

Name of Judge: RAUL A. RAMIREZ

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) name above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Judgment be and hereby is entered finding for Plaintiffs against Defendant for SEVEN HUNDRED SIXTY-TWO THOUSAND, TWENTY-SEVEN AND 35/100 DOLLARS ($762,027,035), and further incorporating

the provisions made in this Court's order filed September 9, 1983, by reference thereto.

Clerk: s/ James R. Grindstaff
September 12, 1983

In an order dated April 19, 1983 this Court denied plaintiffs' motion for relief from judgment pursuant to F.R.Civ.P. 60(b) because a previously filed Notice of Appeal had divested this Court of jurisdiction to entertain the motion. In denying plaintiffs' motion, however, the Court did express its tentative intention to grant plaintiffs' motion should the Ninth Circuit issue a remand. The Ninth Circuit issued its remand on June 7, 1983 and plaintiffs have now filed a renewed motion for relief from judgment, to which defendant filed a statement of non-opposition.

Having reviewed plaintiffs' Memoranda of Points and Authorities submitted in support of the motion and defendant's Statement of Non-opposition, the Court hereby GRANTS plaintiffs' motion for relief from judgment.

Plaintiffs identify two errors in the Court's calculation of damages. The first error was the Court's application of a personal consumption factor of forty-five percent (45%) to the total economic loss of $803,371.00 suffered by plaintiff NAOMI RUTH WEST. The personal consumption factor should have been applied only to the retirement, income and fringe benefits. When this adjustment is made, the present value of the net after tax loss to plaintiff NAOMI RUTH WEST is $457,907.35. This amount is calculated as follows:

a)	retirement benefits ($424,651 x .55)	$233,558.05
b)	income and fringe benefits ($343,046 x .55)	$188,675.30
c)	household services	$31,896.00
d)	funeral expenses	$ 3,778.00
		$457,907.35

The second error involved allocating the entire amount of loss of income and fringe benefits to plaintiff NAOMI RUTH WEST. Because plaintiff NAOMI RUTH WEST's life expectancy was only ten (10) years and decedent's life expectancy was fifteen (15) years, one third of the income and fringe benefits should have been allocated to the children. Thus, $62,892.00 should be allocated amongst the three children in accordance with the formula employed by the Court in Finding XXXIII. This results

in augmenting the damages to the children in the following amounts:

(a)	plaintiff BRUCE ALAN WEST	$16,980.84
(b)	plaintiff BRIAN ROBERT WEST	$20,754.36
(c)	plaintiff ROBERTA EILEEN WEST	$25,156.80
		$62,892.00

Moreover, the total economic loss to plaintiff NAOMI RUTH WEST must be reduced by a corresponding $62,892.00, resulting in a net economic loss of $395,015.35.

In light of the aforegoing, Finding of Fact XXXI shall be amended as read as follows:

Because plaintiff's decedent, Harold Robert West, would have utilized approximately forty-five percent (45%) of the retirement benefits and income and fringe benefits, plaintiff NAOMI RUTH WEST has suffered a net after tax economic loss of $457,907.35. However, because of

plaintiff NAOMI RUTH WEST's foreshortened life expectancy, her income and fringe benefits must be reduced further by one-third, and the reduction must be allocated amongst her children in accordance with the formula applied in Finding XXXIII. Thus, once plaintiff NAOMI RUTH WEST's income loss is reduced by one third, the present value of the net after tax loss of plaintiff NAOMI RUTH WEST is $395,644.50.

Finding of Fact XXXIII shall be amended to award the children the following sums:

a) plaintiff
BRUCE ALAN WEST $76,980.84

b) plaintiff
BRIAN ROBERT WEST $95,754.36

c) plaintiff
ROBERTA EILEEN WEST $115,156.80

IT IS FURTHER ORDERED that the sums stated in Conclusions of Law XVII, XIX,

XX, and XXI shall be amended in accordance with the above.

IT IS FURTHER ORDERED that Conclusion of Law XXIII shall be amended to state that plaintiffs are entitled to a total award of damages as and against defendant, THE UNITED STATES OF AMERICA, in the sum of Seven Hundred Sixty Two Thousand Twenty Seven Dollars and Thirty-Five Cents ($762,027.35) plus costs as permitted by law.

IT IS FURTHER ORDERED that the word "Conveyor" in Finding III, p.2, l. 16 shall be stricken, and the word "Convair shall be substituted in its place.

IT IS FURTHER ORDERED that the Judgment filed on November 2, 1982 shall be amended so as to state the total amount of the

damage award ($762,027.35) against defendant.

IT IS SO ORDERED.

DATED: September 6, 1983

RAUL A. RAMIREZ, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX H

JUDGMENT IN A CIVIL CASE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-1533
DC No. CIV S-76-138 RAR

ORDER

NAOMI RUTH WEST, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA
Defendant-Appellant.

No. 83-1533
DC No. CIV S-77-590 RAR

DULCY STEINLAUF, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Before: HUG and FERGUSON, Circuit Judges,
and WATERS*, District Judge

---

*The Honorable Laughlin E. Waters, United States District Judge for the Central District of California, sitting by designation.

The submission of this case for decision is vacated until further order of the court.

This order is taken in order to permit the court to have the benefit of the Supreme Court's review of the decision of this court in Varig Airlines v. United States, 692 F.2d 1205 (9th Cir. 1982).

Submission vacated.

Clerk: s/ Phillip B. Winberry
March 26, 1984

APPENDIX I

JUDGMENT IN A CIVIL CASE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-1533
DC No. CIV S-76-138 RAR

ORDER

NAOMI RUTH WEST, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA
Defendant-Appellant.

No. 83-1533
DC No. CIV S-77-590 RAR

DULCY STEINLAUF, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Before: HUG and FERGUSON, Circuit Judges,
and WATERS*, District Judge

---

*The Honorable Laughlin E. Waters, United States District Judge for the Central District of California, sitting by designation.

The cases are remanded to the district court to permit it to evaluate its decision in light of United States v. Varig Airlines, ___ U.S. ___ (June 19, 1984).

Any appeals from the final judgment of the district court will be calendared before this panel.

Remanded for new evaluation.

Clerk: s/ Phillip B. Winberry
July 25, 1984

APPENDIX J

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NO. CIV.S-76-138 RAR

ORDER

NAOMI RUTH WEST, et al.,
Plaintiffs,
v.
UNITED STATES OF AMERICA
Defendant.

NO. CIV.S-77-590 RAR

DULCY STEINLAUF, et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

NAME OF JUDGE: RAUL A. RAMIREZ

Upon consideration of the motion of the defendant for a continuance of the Status Conference now set for August 27, 1984.

IT IS HEREBY ORDERED that said motion is denied.

DATED: August 29, 1984.

APPENDIX K

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NO. CIV.S-76-138 RAR

SUPPLEMENTAL FINDINGS OF
FACT AND CONCLUSIONS OF LAW

NAOMI RUTH WEST, et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA
Defendant.

NO. CIV.S-77-590 RAR

DULCY STEINLAUF, et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

NAME OF JUDGE - RAUL A. RAMIREZ

PROCEDURAL BACKGROUND

The above-entitled consolidated actions are now before the Court on remand from the Ninth Circuit Court of Appeals for the

sole purpose of reevaluation in light of U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense (hereinafter Varig), ___ U.S. ___, 104 S.Ct. 2755, 71 L.Ed2d 919 (1984). On December 17, 1985, the Court heard oral argument on the issue of whether Varig created a new and/or clarified standard of determination on the issue of the discretionary function exception to the Federal Tort Claims Act. See 28 U.S.C. §1346, et seq. and the exception at 28 U.S.C. §2680(a) Following the hearing, the Court issued an order indicating that it was not satisfied that the existing factual record was sufficient to properly apply the discretionary function doctrine as described by the Supreme Court in Varig. Therefore, the Court ordered a Further Status Conference for the purpose of exploring the need for further factual development.

On March 19, 1985, the Court conducted the aforementioned Status Conference and thereafter ordered the parties to file written briefs on remaining legal issues. After consideration of the briefs the Court determined that an evidentiary hearing was necessary to clarify the record on the issue of discretionary function and to resolve remaining factual disputes.

On August 14, 1985, a limited evidentiary hearing was conducted in open Court at which time Marshall L. Foreman, Esq., appeared as counsel for plaintiffs, NAOMI RUTH WEST, et al., and Terry O'Reilly, Esq., appeared as counsel for plaintiffs, DULCY STEINLAUF, et al. Barbara B. O'Malley, Special Litigation Counsel, Torts Branch, Civil Division, United States Department of Justice, appeared as counsel for defendant, UNITED

STATES OF AMERICA. Having considered the initial evidence produced by the respective parties at the time of trial and having considered various supplemental memoranda and evidence presented at the limited evidentiary hearing, the Court now issues its supplemental findings of fact and conclusions of law with respect to the issue of discretionary function as per the remand of the Ninth Circuit Court of Appeals:

SUPPLEMENTAL FINDINGS OF FACT

I

Paul Cromwell, an employee of the Federal Aviation Administration, an agency of the United States of America, acting in the course and scope of his employment, prepared the IFR departure procedure from Bishop Airport.

II

The departure procedure for Bishop Airport was published in the Federal Register and was current at the time of this accident. A pilot departing Bishop on an active IFR flight plan is required to follow either the published IFR procedure or an alternative approved by the Air Route Traffic Control Center. Sierra Pacific Airlines Operations Specifications, issued by the FAA pursuant to 14 CFR Part 121, and the Sierra Pacific Airlines Operations Manual, approved by the FAA pursuant to 14 CFR Part 121, required that the flight crew follow the published departure procedures.

III

Paul Cromwell prepared the IFR departure procedure from Bishop Airport by reference to various airport layout plans, surveys and topographic charts; he did not

visit the site or look at aerial photographs of Bishop Airport nor did he make inquiry of anyone at Bishop Airport regarding local conditions or make any investigation to determine if there was a risk of visual illusion.

IV

The rules and regulations of the Federal Aviation Administration in effect when Paul Cromwell prepared the departure procedure required that he exercise good judgment in preparing the visual segment of the instrument departure procedure. The decisions whether or not to visit the site, look at aerial photographs of Bishop Airport, make inquiry regarding local conditions, or make an investigation of possible visual illusions, are not specifically addressed in the FAA rules and regulations. Rather, Cromwell was delegated the duty and power to make such

determinations based upon his professional aviation expertise as well as his background, experience, and knowledge.

V

In making professional aviation decisions with respect to the preparation of the departure procedure, Cromwell was authorized only to consider the safety of the procedure and not social, political, or economic considerations other than safety.

VI

Lloyd J. Anderson was employed by the FAA as a pilot and flew the commissioning flight checks for the Bishop VOR. Acting in the course and scope of his employment, Anderson did not fly any checks at night nor did he investigate the lighting east of the airport or make any check for safety of the visual segment of the IFR departure other than to look for tele-

vision radio towers and other such obstructions within the two mile arc.

VII

The rules and regulations of the Federal Aviation Administration in effect when Lloyd J. Anderson flew the commissioning flight checks required that he exercise good judgment in carrying out his duties. The decisions whether or not to fly any checks at night, investigate the lighting east of the airport, or make other safety checks other than those which were made, are not specifically addressed in the FAA rules and regulations. Rather, Anderson was delegated the duty and power to make such determinations based upon his professional aviation expertise as well as his background, experience, and knowledge.

VIII

In making professional aviation decisions with respect to the flying of

the commissioning flight checks, Anderson was authorized only to consider the safety of the procedure and not social, political, or economic considerations other than safety.

IX

Paul C. Thornberry, employed by the FAA and acting in the scope and course of his employment, approved the first air carrier Operations Specifications for Sierra Pacific Airlines for the Convair 340/440 airplane. Sierra Pacific Airlines could not lawfully operate the Convair 340/440 airplane into and out of Bishop Airport at night without FAA authorization and approval.

X

Although the FAA did not make any proving flight at night from the Bishop Airport in a Convair 340/440 airplane, an FAA employee authorized and approved

Sierra Pacific Airlines' use of Bishop Airport for night departures in the Convair 340/440 airplane.

XI

The rules and regulations of the FAA in effect when the nighttime use was authorized and approved required that FAA employees exercise good judgment. The decision whether or not to authorize nighttime flights without having made any proving flight at night, is not specifically addressed in the FAA rules and regulations. Rather, Thornberry and other FAA employees were delegated the duty and power to make such determinations based upon their professional aviation expertise as well as their backgrounds, experiences, and knowledge.

XII

In making professional aviation decisions with respect to the authorization of

night flights, Thornberry and other FAA employees were authorized only to consider the safety of such night flights and not social, political, or economic considerations other than safety.

SUPPLEMENTAL CONCLUSIONS OF LAW

I

It is the nature of the conduct and not the status of the actor, that governs whether the discretionary function exception applies in a given case.

> Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee -- whatever his or her rank -- are of the nature and quality that Congress intended to shield from tort liability.

Varig, supra, ___ U.S. at ___, 104 S.Ct. at 2765.

II

The discretionary function exception is particularly applicable to governmental conduct which can be categorized as "regulatory" in nature.

> ... whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.

Varig, supra, ___ U.S. at ___, 104 S.Ct. at ___ It is inappropriate, however, to limit the application of the discretionary function doctrine to regulatory decisions. Begay v. U.S., F.2d. ____, ___ (9th Cir. August 13, 1985). Generally, even with respect to non-regulatory actions, the exception will be applied to decisions based on the actor's "judgment of what the best course of action was under the existing circumstances." Id. at

III

It is necessary, in applying the discretionary function exception, to consider whether imposition of governmental tort liability will impair important government decision-making functions.

> Congress took steps to protect the Government from liability that would seriously handicap efficient government operations.

Varig, supra, ___ U.S. at ___ 104 S.Ct. at 2765. The Court must decline to review agency decisions when such review "would be an encroachment into the decision-making process of the executive branch." Begay, supra, at ___.

IV

The discretionary function exception is particularly applicable to actions by government officials involving "policy" choices made for a "governmental purpose."

> Congress wished to prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.

Varig, supra, ___ U.S. at ___, 104 S.Ct. at 2765. See also Id., ___ U.S. at ___, 104 S.Ct. at 2768-2769: (In holding that the FAA's administration of a spot-check program was within the discretionary function exception, the Court stated that "these engineers and inspectors necessarily took certain calculated risks, but those risks were encountered for the advancement of a governmental purpose and pursuant to the specific grant of authority in the regulations and operating manuals.")

V

Regulatory activity within the discretionary function exception includes the determination by an agency of:

> ...the extent to which it will supervise the safety procedures of private individuals.

Varig, supra, ___ U.S. at ___, 104 S.Ct. at 2768.

VI

The discretionary function exception includes more than initiation of programs and activities.

> It also includes determinations made by executives and administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion.

Dalehite v. United States, 346 U.S. 15, 35-36, 73 S.Ct. 956, 968 (1953).

VII

Acts of subordinates in carrying out the plans, specifications, or schedules of operations of government in accordance with official directions fall within the discretionary function exception.

> If it were not so, the protection of §2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a casual step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion.

Dalehite, supra, 346 U.S. at 36, 73 S.Ct. at 968.

VIII

Actions by FAA employees of any rank or status within the agency, are within the discretionary function exception, if made for a governmental purpose for which said employees are empowered to make judgments regarding the appropriate scope of governmental regulation of private individuals.

> The FAA employees who conducted compliance reviews of the aircraft involved in this case were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a

> given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources.

Varig, supra, ___ U.S. at ___, 104 S.Ct. at 2768.

IX

The actions of each of the government officers charged herein with negligence were within the scope of the discretionary function exception.

X

Paul Cromwell was empowered to make judgments on the basis of the governmental purpose of safety in the preparation of the IFR departure procedure from Bishop Airport. His decisions not to investigate the risk of visual illusion or otherwise make inquiries which would have averted the air crash, were his judgments of what the best course of action was under the existing circumstances. A review of these

decisions would be an encroachment into the decision-making process of the executive branch.

XI

Lloyd J. Anderson was empowered to make judgments on the basis of the governmental purpose of safety in the flying of commissioning flight checks for the Bishop VOR. His decisions regarding the best way to ensure safety and, in particular, his decisions not to fly any checks at night or otherwise investigate the lighting east of the airport, were his judgments of what the best course of action was under the existing circumstances. A review of these decisions would be an encroachment into the decision-making process of the executive branch.

XII

Paul C. Thornberry and other FAA employees were empowered to make judgments on the basis of the governmental purpose of safety in the approval of Sierra Pacific Airlines' use of Bishop Airport for night departures in the Convair 340/440 airplane. Their decisions to approve such night flights without having made any proving flight at night, were their judgments of what the best course of action was under the existing circumstances. A review of these decisions would be an encroachment into the decision-making process of the executive branch.

XIII

The actions of Cromwell, Anderson, Thornberry, and other FAA employees were premised upon specific grants of discretionary authority from the FAA to

exercise their best judgment under the circumstances. Whether or not these decisions were negligent is not relevant. Whether these officers occupied high-level planning level positions or bottom-rung operational positions is not relevant. The nature of their decisions and actions involved discretion of the type that Congress entrusted to the executive branch and not to this Court for review by way of tort litigation.

Based on the foregoing reasons and authority,

IT IS HEREBY ORDERED that the judgments in these consolidated cases in favor of plaintiffs are VACATED and the Clerk, by his Deputy, is instructed to enter

judgment in favor of defendant, UNITED STATES OF AMERICA.[1/]

IT IS SO ORDERED.

DATED: August 29, 1985.

1/ The present decision represents a complete departure from the Court's prior order of May 8, 1981. While convinced that the departure is mandated by the rationale of Varig, the Court is hopeful that the Varig doctrine will be clarified so as to preclude what this Court perceives as a grant of absolute immunity to certain FAA activities.

APPENDIX L

JUDGMENT IN A CIVIL CASE
(Amended)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DC NO. CIV-S-76-138 RAR
CIV-S-77-590-RAR

NAOMI RUTH WEST

v.

FEDERAL AVIATION

NAME OF JUDGE - RAUL A. RAMIREZ

Decision by Court. This action came to trial or hearing the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment be and hereby is entered in favor of defendant, United States of America.

Clerk: /s James R. Grindstaff
August 30, 1985

APPENDIX M

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NO. CIV-S-76-138 RAR
CIV-S-77-590-RAR

NOTICE

NAOMI RUTH WEST

vs.

FEDERAL AVIATION

You are hereby notified that: Judgment was entered in this action on August 30, 1985.

Clerk: /s James R. Grindstaff
August 30, 1987

Deputy Clerk: /s S. Sinader

APPENDIX N

JUDGMENT IN A CIVIL CASE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 85-2601
D.C. NO. CIV.S.-76-138-RAR

OPINION

NAOMI RUTH WEST, et al.,
Plaintiffs-Appellants
v.
FEDERAL AVIATION ADMINISTRATION,
UNITED STATES OF AMERICA,
Defendants-Appellees.

DUCLY STEINLAUF, as Special
administratrix of the Estate of
James Steinlauf; DULCY STEINLAUF,
individually and MALCOLM STEINLAUF,
individually,
Plaintiffs-Appellants,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Argued and submitted September 17, 1987 - San Francisco, California.

Filed October 21, 1987.

Before: Herbert Y. C. Choy, Arthur L. Alarcon and Diarmuuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Alarcon.

Appeal from the United State District Court for the Eastern District of California (Sacramento); Raul A. Ramirez, District Judge, Presiding.

SUMMARY

Administrative Law/Governmental Torts

Appeal from judgment. Affirmed.

Decedent was killed in a Sierra Pacific airplane crash while attempting to depart from Bishop Airport. Departing pilots were required to follow a FAA departure procedure established by an FAA Procedure Specialist or an alternative approved by the Federal Air Route Traffic Control Center. Sierra Pacific's FAA approved specifications and manuals required their pilots to use the FAA procedure. The district court found that a nighttime visual phenomenon was the accident's cause. Although FAA employees were aware

of the visual phenomenon, no special steps were taken to determine whether there was a problem with the lighting at Bishop Airport or reliance on a distance requirement. The FAA did not make a night flight check of the visual climb aspect of the departure procedure. At the first trial, the district court found that FAA employees were negligent. The United States appealed. On remand, in light of the recent Varig Airlines decision, the district court held that it was without subject matter jurisdiction to consider West's claims because the conduct of the FAA employees fell within the discretionary function exception to the Federal Tort Claims Act (FTCA). Accordingly, the district court vacated the prior judgment and dismissed the action.

[1] The FAA has the power to establish necessary procedures and regulations for

the safety of flight in air commerce. It exercised that discretion in determining that a departure procedure should be designed for Bishop Airport. [2] Appellants argue that the district court considered safety alone and did not evaluate the social, political or economic policy considerations that Varig requires. [3] However, the decision the FAA made here as to what is necessary for establishing a safe departure procedure includes at the very least the same social and economic considerations in Varig. [4] The FAA has used its discretionary power to delegate the judgment decisions to the employees in helping to establish guideline procedures. The FAA employees used that judgment in deciding that it was not feasible or necessary to make any more tests on the procedure because the costs outweighed any added safety benefits. [5]

The FAA only established a procedure for departure from Bishop Airport, it did not warrant that such procedure would be safe under all conditions.

COUNSEL

Marshall L. Foreman, San Diego, California, and Richard B. Goethals, Jr., San Francisco, California, for the plaintiffs-appellants.

Barbara B. O'Malley. Dept. of Justice, Washington, D. C., for the defendants-appellees.

OPINION

ALARCON, Circuit Judge:

I

Naomi Ruth West, her three children and Dulcy and Malcolm Steinlauf (hereinafter appellants) appeal the district court's order that it lacked subject matter jurisdiction to determine whether the acts of certain Federal Aviation Administration

(FAA) employees were responsible for the crash of a Sierra Pacific airplane at Bishop Airport in California. Plaintiffs claim that the filing of this action was proper under the Federal Tort Claims Act (FTCA) and that the challenged actions of the FAA do not fall within the discretionary function exception to liability under the FTCA. We disagree and affirm.

A.

Bishop Airport lies in a deep funnel-shaped valley bounded on the west by the Sierra Nevada Mountains and on the east by the White Mountains. The terrain to the east of the airport begins to rise rapidly at about three and a half miles and to the west of the airport at about eight miles.

An FAA Procedures Specialist designed and approved a special instrument approach and departure procedure for Bishop Airport. The procedure was checked according

to FAA regulations during a series of daytime flights.

The approved procedure required that the airplane climb after takeoff to 8,000 feet within two miles of the airport. This is done by flying a two mile arc circling around the airport while climbing. Because of the height and the proximity of the mountains to the airport, a requirement that a pilot climb 8,000 feet under instrument conditions would not provide enough margin for safety to meet FAA requirements. Consequently, the departure procedure the FAA specialist designed required pilots to maintain a two mile distance from the airport visually during the climb.

Pilots departing from Bishop Airport were required to follow the FAA departure procedure or an alternative approved by the Federal Air Route Traffic Control

Center. Sierra Pacific's FAA approved Operations Specifications and Operations Manual required their pilots to use the FAA procedure.

B.

The accident occurred when a Sierra Pacific charter flight struck the slope of the White Mountains while attempting to depart from the Bishop Airport. The district court found that it was more probable than not that the cause of the accident was a lack of sufficient ground lighting, resulting in a visual phenomenon whereby pilots flying on a very black night could be misled into believing they were closer to the airport than they actually were.

Although FAA employees were aware of the visual phenomenon, no special steps were taken to determine whether there was a problem with the lighting at Bishop

Airport or reliance on the two mile distance requirement on a dark night. The FAA did not make a night flight check of the visual climb aspect of the departure procedure.

C.

At the first trial in this matter, the district court found that the proximate cause of the accident was that FAA employees, acting in the scope and course of their employment, negligently failed to conduct night test flights of the visual climb reprocedure.[1/] The United States appealed. We remanded for reevaluation in light of the Supreme Court's decision of

---

1/ In their initial complaint, appellants also contended that the FAA employees negligently certified Sierra Pacific to conduct flights from Bishop Airport at night. At oral argument, the attorneys for the appellants conceded that the FAA employees' conduct involved in certifying Sierra Pacific was within the discretionary function exception and stated that they were no longer claiming liability for those actions.

United Stated v. S. A. Empresa de Ciacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984). On remand, the district court held that it was without subject matter jurisdiction to consider these claims because the conduct of the FAA employees fell within the discretionary function exception to the FTCA. Accordingly, the district court vacated the prior judgment and dismissed the action.

II

We review de novo a determination whether the discretionary function exception to the FTCA applies. Baker v. United States, 817 F.2d 560, 562 (9th Cir. 1987).

"[T]he United States can be sued only to the extent that it has waived its [sovereign] immunity . . . ." United States v. Orleans, 425 U.S. 807, 814 (1976); Baker, 817 F.2d at 562. The

burden of showing an unequivocal waiver of immunity lies with the party bringing a cause of action against the federal government. Baker, 817 F.2d at 562. The FTCA provides for a limited waiver of the federal government's immunity. 28 U.S.C. § 1346(b) (1982).[2/]

Several classes of tort claims are excepted from the FTCA's waiver of immunity. Baker, 817 F.2d at 562. 28 U.S.C. § 2680(a) (1982) states in part that section 1346(b) does not apply to any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty

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2/ Section 1346(b) renders the United States liable for damages for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

The Supreme Court's decision in Varig is its most recent discussion of the discretionary function exception. In Varig, the Supreme Court held that the United States was not liable for any negligence on the part of the FAA in certifying the aircraft in question for commercial aviation use. 467 U.S. at 819-20. The Court held that the procedures chosen for certification were left to the discretion of the FAA and therefore were exempt from the FTCA under the discretionary function exception Id.

In reaching its decision, the Court found two factors useful "in determining when the acts of a Government employee are protected from liability by § 2680(a)." Id. at 813.

> First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function applies in a given case . . . . [T]he basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee--whatever his or her rank--are of the nature and quality that Congress intended to shield from tort liability.

Id.

The second factor was based on a reading of the legislative history of section 2680(a). Baker, 817 F.2d at 564. The Supreme Court stated that the discretionary function exception included at the very least "the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals." Varig, 467 U.S. at 813-14 (footnote omitted). The Court found that Congress intended to "prevent judicial

'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Id. at 814.

"Our post-Varig decisions have hewed closely to the . . . Varig view[] of the discretionary function exception." Baker, 817 F.2d at 564 (collecting cases). In Begay v. United States, 768 F.2d 1059, 1064 (9th Cir. 1985), we held that any time judicial review would encroach upon an agency's balancing of policy issues, the exception would apply. We also stated that Varig compels us to analyze the nature of the conduct in each case to determine if the discretionary function exception is applicable. Id.

III

[1] Congress has given the FAA the power to establish necessary procedures

and regulations for the safety of flight in air commerce. 49 U.S.C. § 1421(a)(1),(6) (1982).[3/] The FAA also has the power to delegate that discretion to its agents and employees. 49 U.S.C. § 1346(d) (1982).[4/] The FAA exercised that discretion in determining that a departure procedure should be designed for Bishop Airport.

FAA employees were delegated the power and duty to determine whether nighttime proving flights were required before approving the departure procedure designed for Bishop Airport. The district court found that FAA employees, when making these decisions, "were authorized only to consider the safety of the procedure and

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3/ This section became effective in 1958.

4/ This section was repealed effective 1983. It was in effect when the conduct at issue was performed. The authority to delegate duties is currently found at 49 U.S.C. § 322(b) (1982).

not social, political or economic considerations other than safety." (Emphasis added).

[2] Appellants, while admitting that discretion was involved in the decisions the FAA made, argue that the district court considered safety alone and did not evaluate the social, political or economic policy considerations that Varig requires. Appellants argue that safety is not a social, political or economic consideration.

[3] FAA employees consider safety in exercising their judgment whether to establish departure procedures for airports. They also consider safety in exercising their judgment whether night proving flights are needed. Determination of safety requirements involves a balancing of social, economic or political policies. In any safety decision, there

are limits to the resources available to test and inspect the procedure and those who will be using it. Varig, 467 U.S. at 820. In Varig the Court held that regulatory activity within the discretionary function exception includes an agency's determination of "the extent to which it will supervise the safety procedures of private individuals . . . ." Id. at 819-20 (emphasis added). See also Cunningham v. United States, 786 F.2d 1445, 1447 (9th Cir. 1986) (when Congress leaves the establishment and enforcement of safety standards to an agency, it intends an exercise of that discretion to fall within the discretionary function exception). The decision the FAA made here as to what is necessary for establishing a safe departure procedure includes at the very least the same social and economic considerations in Varig.

Practical considerations such as staffing and funding are policy decisions excepted under the discretionary function exception, Varig, 467 U.S. at 820. The district court properly took such considerations into account.

A.

Appellants contend that the decision of FAA employees whether to perform night test flights of the visual climb departure procedure was not an exercise of discretion within the discretionary function limitation. The district court found that the employees responsible for establishing the departure procedure were to use their own best judgment in deciding what tests were required before the specific procedure was put into effect. There were no FAA regulations in effect at the time the procedure was developed requiring flights to test the visual

climbs aspects. In fact, there were very few guidelines given to help in establishing any part of the departure procedures. See United States Standard Flight Inspection Manual, p. 152 §§ 421-22. ("field personnel will continue to use their good judgment in establishment of procedures).

[4] As in Varig, the FAA has used its discretionary power to delegate the judgment decisions to the employees in helping to establish guideline procedures for flight in air commerce. The FAA employees used that judgment in deciding that it was not feasible or necessary to make any more tests on the procedure because the costs of doing the type of tests the appellants suggested would greatly outweigh any added safety benefits.

[5] Another factor the FAA employees were entitled to consider in designing the departure procedure is that the pilot has the primary responsibility to determine whether conditions are safe enough to use the prescribed procedures. See 14 C.F.R. §§ 91.3, 91.5 (1987)[5/] (pilot of an aircraft is responsible for the operation of that aircraft and must familiarize himself with all available information concerning a flight before departure). The Supreme Court in Varig found that it was appropriate for the FAA to take into consideration the manufacturer's primary responsibility for safety when carrying out its inspection and certification procedures. 467 U.S. at 816. Here, the pilot had the primary responsibility to make sure that the aircraft was flown

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5/ These sections became effective in 1963.

safely, 14 C.F.R. § 91.3, and that conditions existing at the time of departure would allow for a safe flight, 14 C.F.R. § 91.5. The FAA only established a procedure for departing from Bishop Airport, it did not warrant that such procedure would be safe under all conditions.

In Colorado Flying Academy, Inc. v. United States, 724 F.2d 871, 876-77 (10th Cir. 1984), cert. denied, 106 S.Ct. 2915 (1986), the Tenth Circuit held that the administrative decision involving in creating terminal control areas (TCA) where visual flight procedures could not be used fell within the discretionary function limitation of the FTCA. Although the FAA established general guidelines for the design of the TCA, the decision was left to the discretion of the employee designing the particular configuration.

Id. at 874. There were no mandatory standards controlling the design. Id. The latitude in the guidelines emphasized the discretion available to the designer and called for balancing competing interests and policies and tailoring the TCA to met local conditions. Id. at 876-77.

The analysis the Tenth Circuit employed in Colorado Flying Academy is applicable to the facts presented in the instant matter. The FAA employees who were responsible for the design of the departure procedures from Bishop Airport were given wide discretion. They were required to use their best judgment in deciding what tests were necessary to met reasonable safety requirements. This required a balancing of social and economic interests and a tailoring of safety requirements to local conditions.

IV

We affirm the district court's dismissal for lack of subject matter jurisdiction. The design of the departure procedure was an exercise of discretion under 49 U.S.C. § 1421(a)(6). The exercise of a discretionary function is an exception to the FTCA.[6/]

6/ Whether the decisions made in this case were correct ones is not at issue. Once it is established that the decision is within the discretionary function exception, the acts of the federal employee are immune from liability even if they are negligent or there was abuse involved. 28 U.S.C. § 2680(a). See also National Gas Pipeline Co. v. United States, 742 F.2d 502, 504 (9th Cir. 1984) (the FAA's negligent certification was immune from tort liability because certification process involves discretion).

APPENDIX O

[NOT FOR PUBLICATION]

JUDGMENT IN A CIVIL CASE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 85-2601
D.C. NO. CIV.S-76-138 RAR

ORDER

NAOMI RUTH WEST, et al.,
Plaintiffs-Appellants,
v.
FEDERAL AVIATION ADMINISTRATION
UNITED STATES OF AMERICA,
Defendants-Appellees.

No. 85-2612
D.C. No. Civ.S-77-590-RAR

DULCY STEINLAUF, as Special administratrix of the Estate of James Steinlauf; DULCY STEINLAUF, individually and MALCOLM STEINLAUF, individually,
Plaintiffs-Appellants,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of California (Sacramento). Raul A. Ramirez, District Judge, Presiding.

The order of September 14, 1987 consolidating the appeals in No. 85-2612 and No. 85-2601 with the appeals in No. 83-1533 and No. 83-1893 is vacated as improvidently granted. Mandate was issued in No. 83-1533 and No. 83-1893 on August 17, 1984.

Clerk: /s Cathy A. Catterson
October 20, 1987

Supreme Court, U.S.
FILED
MAR 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1270

In the Supreme Court of the United States

OCTOBER TERM, 1987

NAOMI RUTH WEST, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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Statute:

Federal Tort Claims Act, 28 U.S.C. 2680(a) 1, 2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1270

NAOMI RUTH WEST, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred when it held that discretionary function exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. 2680(a), bars petitioners' claim that the Federal Aviation Administration (FAA) negligently failed to conduct night test flights before approving a departure procedure for the airport near Bishop, California.

1. Petitioners filed suit to recover damages for the wrongful deaths of passengers on a Sierra Pacific charter flight that struck the side of a mountain while attempting to depart the airport on a moonless and extremely dark night. They alleged that inadequate ground lighting near the airport caused the pilot of the plane to misjudge the plane's distance from the mountains. Petitioners claim that the FAA was liable for the crash because the FAA had negligently failed to conduct night test flights prior to publishing an approved departure procedure for the Bishop Airport. Pet. App. 122a.[1]

[1] Because the mountains surrounding the airport were both high and close, the FAA departure procedure called for the pilot to fly a

The district court made findings and entered judgments for two groups of plaintiffs in April 1981 and October 1982 (Pet. App. 1a-72a). The government appealed, and the Ninth Circuit remanded the cases to the district court in 1984 for reconsideration in light of *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984) (Pet. App. 88a-89a). On remand, the district court vacated its earlier judgments and entered judgment for the government, concluding that FAA officials who investigated safety conditions at Bishop Airport and subsequently prepared departure procedures for use there were acting "within the scope of the discretionary function exception" (*id.* at 107a).

2. The Ninth Circuit affirmed, holding that "[t]he design of the departure procedure was an exercise of discretion" and, thus, did not subject the government to a tort action under the FTCA (Pet. App. 136a). The court noted that the FAA had the power to establish necessary procedures and regulations for flight safety and had the power to delegate that discretion to its employees (*id.* at 128a). It further stated that FAA employees had in fact been delegated the power to determine what safety tests were necessary before approving departure procedures at Bishop Airport. The FAA employees were required only "to use their best judgment in deciding what tests were necessary to meet reasonable safety requirements" (*id.* at 135a) and make their decisions about departure procedures

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two-mile arc circling around the airport while climbing to 8,000 feet. It was essential to the FAA procedure that the pilot measure his distance from the airport visually, since reliance on instruments alone would not have provided sufficient margin for error. Pet. App. 120a.

Pilots departing from Bishop Airport were required to use either the FAA procedure or an alternative approved by the Federal Air Route Traffic Control Center. Sierra Pacific's own operations manual required its pilots to use the FAA procedure. Pet. App. 120a-121a.

accordingly. The court of appeals also found that, pursuant to FAA regulations, the pilot has the primary responsibility to determine whether conditions were safe enough to use the prescribed procedures (*id.* at 133a).[2]

3. The court of appeals' decision is correct. This case is indistinguishable in principle from *Varig Airlines* and was properly dismissed for that reason.

a. This Court stated in *Varig Airlines*, 467 U.S. at 814, that Congress' purpose in attaching the discretionary function exception to the FTCA was "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Petitioners contend (Pet 17-20) that *Varig Airlines* does not apply to the current case since the decisions at issue here were based solely on "safety" issues and not "social, political, or economic policies. What petitioners overlook is that *Varig Airlines* itself dealt with a "safety" issue.

The only difference between this case and *Varig Airlines* is that the FAA's safety standards in dispute relate to the flying of aircraft rather than to the design or manufacture of aircraft. In both cases, decisions as to how to promote safety in air travel involve a balancing of social, economic or political policies. This balancing includes practical considerations such as staffing and funding, which clearly require policy decisions covered by the discretionary function exception (Pet. App. 131a). See *Varig Airlines*, 467

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[2] In district court petitioners had also contended that the FAA was negligent in allowing Sierra Pacific to use Bishop Airport at night. At oral argument before the Ninth Circuit, attorneys for petitioners conceded that the FAA's certification of Sierra Pacific for night flights from Bishop Airport was within the discretionary function exception and stated that they were no longer claiming damages because of that action. Pet. App. 122a n.1. Petitioners have not sought to revive this claim in their petition.

U.S. at 820. Petitioners correctly point out (Pet. 20) that an operational error made by an air traffic controller is not protected by the discretionary function exception. *Eastern Air Lines, Inc.* v. *Union Trust Co.*, 221 F.2d 62 (D.C. Cir.), aff'd, 350 U.S. 907 (1955). But the "nature and quality" of that action—akin to a driver's turning left when he should have turned right—is fundamentally different from the decision of what safety tests were necessary before approving departure procedures. The ultimate operational burden in this case, and hence the ultimate responsibility for safety, was on Sierra Pacific Airlines, not the FAA. "When an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind." *Varig Airlines*, 467 U.S. at 819-820.

b. Petitioners contend that before *Varig Airlines* "courts appeared to have found workable guidelines for applying the discretionary function immunity" (Pet. 14) but that after that decision "[i]t is not an exaggeration to say that our jurisprudence is in a shambles in this area and badly in need of clarification" (*id.* at 15-16). They do not, however, identify any post-*Varig* conflict among lower courts regarding the question at issue; nor is any such conflict to be found. Petitioners' ultimate quarrel is clearly with this Court's unanimous and recent ruling in *Varig Airlines*. No further review of that claim is warranted.[3]

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[3] There are no allegations in this case that the FAA negligently failed to follow its own regulations in designing and approving a departure procedure for Bishop Airport. Thus, this case does not present any issue found in *Berkovitz* v. *United States*, cert. granted, No. 87-498 (Jan. 11, 1988), and there is no reason to hold this case for disposition in light of *Berkovitz*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MARCH 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60371